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No. 86 1619

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOCAL UNION NO. 690,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Petitioner,

v.

ROBERT E. CARUSO,

Respondent.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Questions Presented

1. Did the court below err when it:

(a) ignored *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), which requires independent review of libel verdicts based on the malice test; and

(b) measured harmless constitutional error by a substantial evidence test to sustain a libel verdict where constitutional error is admitted?

2. May harmless constitutional error analysis be used in a libel case to affirm a plaintiff's judgment, where jury instructions which allocated the burden of proof on malice and falsity issues to defendant as well as plaintiff were found misleading and erroneous by the court below?

3. May a libel damage award be sustained under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which requires segregation of damages resulting from constitutionally protected activity, where there was no evidence segregating damages from a union's 'do not patronize' campaign from damages caused by defamation?

4. Upon an independent review of the record pursuant to *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), was there clear and convincing evidence that defendant published with malice?

5. Where a labor union asked its members not to patronize a business with whom some members had a dispute, did the courts below err by not applying the standard of fault which this Court in *Letter Carriers v. Austin*, 418 U.S. 264 (1974) identified for labor libel cases?

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Opinion Below

The opinion of the Supreme Court of the State of Washington is reported at 107 Wn.2d 524 and 730 P.2d 1299.

Jurisdiction

The court below affirmed judgment on January 8, 1987. No rehearing was requested. This Court has jurisdiction under 28 U.S.C. § 1257(3).

Constitutional Provision

Constitution of the United States, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

The Plaintiff below, Caruso, ran a retail floor covering store. He also owned a parking lot nearby. One day, a member of Defendant Local Union No. 690 parked a beer delivery truck in Caruso's parking lot while he made deliveries to adjacent taverns. Caruso removed the keys from the truck, words were exchanged between the driver and Caruso, and Caruso had the truck towed away. The driver reported the incident to an officer of Local 690.

The officer had received other driver complaints against Caruso. The officer confirmed the beer truck incident with the driver's employer, who was on the scene, but

did not speak with Caruso. Local 690 then published two articles in a union newspaper requesting readers not to patronize Caruso's business. As reasons for its request, Local 690 alleged that Caruso's business harassed union drivers, impounded their vehicles, and generally was uncooperative (full text of article appears in Appendix, A-6,7).

In an earlier appeal, the state court held that Local 690 had a constitutional right to publish the 'do not patronize' message. *Caruso v. Teamsters Local 690*, 100 Wn.2d 343, 347-348, 670 P.2d 240 (1983). On retrial, Caruso provided no evidence segregating damages from the 'do not patronize' message from damages from the defamation. Nor was there evidence that the 'do not patronize' message contributed nothing at all to Caruso's damages.

The trial court instructed the jury that Local 690 had a qualified privilege to publish the articles, and that Caruso had to overcome the privilege by showing clear and convincing evidence that Local 690 published with constitutional malice (Instruction 18, Appendix C-4). However, the trial court also instructed the jury that it was Local 690's burden to prove that it was privileged to publish the articles (Instruction 10, Appendix C-1). The trial court assigned to Caruso the burden of proving the falsity of the articles but, in the same and another instruction, assigned to Local 690 the burden of proving that the articles were substantially true (Instruction 10 and 11; Appendix C-1, 3). The trial court also instructed the jury that plaintiff could prove fault by showing negligence (Instruction 20; Appendix C-5).

Local 690 excepted to the burden of proof allocations (Appendix D-4, 6) and to the negligence instruction (Appendix D-4, 7). Local 690 assigned error on appeal to those instructsions (Assignments 11, 12, 14; Appendix E-1, 2).

Local 690 moved to dismiss based on Plaintiff's failure to segregate damages (Appendix D-1 through D-4) and assigned error on appeal (Assignment 5, Appendix E-1). Local 690 moved for judgment n.o.v. on the ground that there was insufficient evidence that it published with malice (Appendix F) and assigned error on appeal (Assignment 1, Appendix E-1).

The jury found that Local 690 published with malice. The jury returned a general verdict for $295,000 (reduced to $244,000 due to an earlier settlement with a co-defendant). The verdict did not itemize damages or segregate defamation damages from damages attributable to the protected 'do not patronize' request.

The state Supreme Court found that the burden of proof instructions on falsity and malice were "misleading" and "erroneous," in that they simultaneously assigned the burdens to both Caruso and Local 690 (Appendix A-11,12; A-15,16). The court found no reversible error as it identified "substantial evidence" supporting findings of falsity and malice (Appendix A-13,16). Additionally, the assignment of simultaneous burdens of proving malice did not matter "because the jury in fact found that Local 690 acted with malice" (Appendix A-16). The court did not independently review the evidence to determine whether Local 690 published with malice. Concerning segregation of damages, the court held that the instructions allowed the jury to award damages for defamation only (Appendix A-19 through A-21). The court did not address the argument, preserved and presented by Local 690, that there was no evidence which would permit the jury to distinguish between defamation damages and damages flowing from the constitutionally protected 'do not patronize' request. The court approved the negligence standard of fault on the

twin grounds that there was no labor dispute and that the malice instruction on the qualified privilege issue mooted the point (Appendix A-18).

Reasons For Granting The Writ

I. The Court Below Erred When It Ignored *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), Which Requires Independent Review Of Libel Verdicts Based On Malice. Error Was Compounded When The Court Measured Harmless Constitutional Error By A Substantial Evidence Test Where Constitutional Error Was Admitted.

A. *The Lower Court's Sufficiency Of Evidence Test Conflicts With This Court's Independent Review Rule, As It Delegates Determination Of Malice To The Fact Finder.*

In *Bose Corp. v. Consumer Union*, 466 U.S. 485, 510 (1984), the Court ruled that "[t]he requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law." *Bose* required judges to (466 U.S. at 511):

> independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

The *Bose* rule applies equally to state court judgments. 466 U.S. at 499. Appellate courts cannot defer their constitutional responsibility to finders of fact: "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in a particular case by a jury or by a trial judge." 466 U.S. at 501.

The court below disregarded the settled constitutional rule. Instead of reviewing the record, it ceased analysis upon identifying "substantial evidence in the record to support such a finding [of malice]" (App. A-16). The court made no effort to consider contrary evidence. The court did not square the record with the malice rule of *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968) (reliance on one source and failure to verify information held insufficient to show malice). The court did not mention whether it found the evidence clear and convincing.

The "substantial evidence" test applied below is even more deferential to the factfinder than Fed. R. Civ. Proc. 52(a), which *Bose* held inapplicable to review of malice findings. Under Rule 52, a reviewing court may overturn a fact finding where, "although there is evidence to support it," the court "is left with the definite and firm conviction that a mistake has been committed." *Bose*, 466 U.S. at 499, *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Under the Washington rule, the reviewing court ceases its analysis once facts supporting the verdict are identified, regardless of whether the verdict is sustainable. The court below relied (at App. A-13) on its discussion in *Lillig v. Becton-Dickenson*, 105 Wn.2d 653, 717 P.2d 1371 (1986), where the court explained its standard of review (105 Wn.2d at 657, 717 P.2d at 1374):

> *[E]ven if convinced that a wrong verdict has been rendered*, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. [quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872] (emphasis added).

The court below ignored its obligation under *Bose* and applied a standard of review inconsistent with constitutional adjudication. Review is warranted to correct the error.

B. *The Case Raises The Important Constitutional Question Of Whether A Harmless Error Rule (Assuming Any May Be Employed), Which Excuses Constitutional Error In A Libel Case If Some Evidence Supports The Verdict, Is Consonant With First Amendment Libel Law.*

"[F]ashioning a harmless-constitutional-error rule" is crucial because "harmless-error rules can work very unfair and mischievous results[.]" *Chapman v. California*, 386 U.S. 18, 22 (1967). Here, the jury could have believed that a libel defendant had the burden of proving truth and absence of malice. Evidence on both issues was disputed. Under the rule applied below, the plaintiff's verdict stood because there was some evidence supporting his case. The court below did not determine whether there was evidence sufficient for plaintiff to carry *his* burden of proving falsity and malice. Nor was there an effort to determine whether plaintiff made his case by "clear and convincing proof." *Bose*, 466 U.S. at 511.

Plaintiff prevailed even though the reviewing court did not review the evidence through the prism of the burden and quantum of proof this Court assigns to libel plaintiffs in malice cases. *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____, 89 L.Ed.2d 783, 792-793 (1986). That much is required even at the summary judgment level, before constitutional instructional error could occur. *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 91 L.Ed.2d 202 (1986) (substantive libel law evidentiary standard of proof applies to summary judgment motions). The "substantial evidence" test applied below reduces to a simple syllogism: there was some evidence supporting the verdict, therefore the constitutional error could not have affected the outcome. This Court long ago rejected a

similar test for non-constitutional harmless error. *Kotteakos v. United States*, 328 U.S. 750, 767, 776 (1946); *See also United States v. Lane*, 474 U.S. ____, 88 L.Ed2d 814, 826 n. 13 (1986) ("we can agree with the dissent 'that the harmless error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry' ").

This Court should decide what harmless error rule—if any—should apply where constitutional error is committed. The choice is central to our constitutional system. Constitutional rules, such as the allocation of burdens of proof involved here, either are meaningful or illusory depending on the harmless-constitutional-error standard which gauges the effect of their violation. The standard used below accords little significance to constitutional principles as their violation is harmless should there be some evidence supporting the verdict. Under that formulation, the constitutional rule matters only when the defense is entitled to dismissal at the end of plaintiff's case. For these reasons, the choice of a harmless error rule in libel cases should not be left to haphazard development by lower courts. If there is to be a rule at all, this Court should define it.

II. The Court Should Resolve Whether Harmless Error Analysis Can Be Applied In Libel Cases Where There Is Admitted Constitutional Error. The Decision Below Conflicts With This Court's Earlier Decisions In Libel Cases Containing Constitutional Error.

The court below accepted the settled proposition that the libel plaintiff bore the burden of proving falsity and malice (App. A-10). Both matters are of constitutional dimension. *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____, 89 L.Ed.2d 783, 792-793 (1986). The court

held that instructions which simultaneously assigned the burdens to each party were misleading and therefore erroneous (App. A-11,12; A-15,16). Although the dissent found it "impossible to know what effect" the errors had on the jury (App. A-37), the court applied its version of harmless error analysis. Finding "substantial evidence" of falsity and malice, the court affirmed.

This Court, with one *sui generis* exception, never has recognized harmless constitutional error analysis in libel cases. The Court's consistent decision, when it has identified instructional error, has been to reverse. *New York Times* set the pattern, where the erroneous instructions made it "impossible to know" whether the jury was affected by the error. 376 U.S. at 284. The result was automatic: "[b]ecause of this uncertainty, the judgment must be reversed and the case remanded." *ibid.* The same result has obtained since. [1] The *sui generis* exception is *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). A plurality of four affirmed a judgment despite instructional error where there was "ample" evidence supporting the verdict under the plurality's standard of fault. 388 U.S. at 156-158 (opinion of Harlan, J.). The Chief Justice found enough evidence of malice. 388 U.S. at 168-170. But he emphasized that the defense had waived the error and that he would require "strict compliance" with *New York Times* in the future. 388 U.S. at 166-167. The Court has

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[1] *Henry v. Collins*, 380 U.S. 356, 357 (1965) (*per curiam*); *Rosenblatt v. Baer*, 383 U.S. 75, 82 (1966); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 11 (1970); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974). *See also Time Inc. v. Hill*, 385 U.S. 374, 394-397 (1967) (privacy case-malice test applied).

since required "strict compliance" with the malice standard, as best shown in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970):

> The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the judgment before us. For when "it is impossible to know, in view of the general verdict returned" whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed and the case remanded." *New York Times Co. v. Sullivan*, [376 U.S.] at 284. [other citations omitted].

Harmless constitutional error analysis would be a marked transformation for libel jurisprudence. This Court to date has not embraced the doctrine. Because the decision below conflicts with those of this Court, review should be granted. This Court, not subordinate courts, should first determine whether it is consistent with the First Amendment for libel judgments infected by constitutional error to stand.

III. There Was No Evidence Segregating Damages From The Union's 'Do Not Patronize' Campaign From Defamation Damages. The Award Conflicts With *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) And Should Be Reviewed.

The headline, lead, and close of the articles asked readers not to patronize Caruso. Each was devoid of defamatory content. Any defamation occurred in the reasons for the request, incorporated in the middle of the article. There was nary a question in the transcript which elicited testimony segregating damages resulting from the boycott from damages caused by any defamation. The court below held that the jury instructions allowed damages for defamation only (App. A-21), but ignored Local 690's argument that there was no basis for a damage

award absent evidence showing segregation. Local 690 had preserved its argument (App. D-1 through D-4; Assignment 5, App. E-1).

NAACP v. Claiborne Hardware, Co., 458 U.S. 886 (1982) holds that damages consequential to constitutionally protected speech are not recoverable (458 U.S. at 918): [2]

> While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The court below earlier agreed that the 'do not patronize' message was protected under *Claiborne*. *Caruso v. Teamsters Local Union No. 690*, 100 Wn.2d 343, 347-348, 670 P.2d 240 (1983). Even where the effect of lawful and unlawful speech may be difficult to untangle, the effort must be made. *Claiborne*, 458 U.S. at 933-934 (requires evidence that "carefully identif[ies] the impact of such unlawful conduct, and that recognize[s] the importance of avoiding the imposition of punishment for constitutionally protected activity"). Since there was no evidence of segregation, the damage award is inconsistent with *Claiborne* because it punishes protected speech.

IV. The Court Below Sustained A Malice Finding On The Basis That Local 690 Did Not Make A Reasonable Investigation. This Conflicts With *St. Amant v. Thompson*, 390 U.S. 727 (1968), Requiring Review.

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[2] *See also: Local 20, Teamsters v. Morton*, 377 U.S. 252, 261-262 (1964) (no authority under Taft-Hartley Section 303 to award damages caused by lawful primary activity); *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1022 (7th Cir. 1986) (unlawful picketing together with protected speech; remand under *Morton* where district court provided no reason why effects of lawful and unlawful activity could not be separated).

As already noted, the court below did not independently review the jury's finding that Local 690 published with malice. The court found evidence of "reckless disregard of the truth" by Local 690's failure to contact Caruso or otherwise corroborate the story, its lack of knowledge of prior complaints about Caruso, and its ignorance that Caruso's parking lot was three blocks away from his store (App. A-16). The court's second and third observations have no basis in the record. Moreover, failure to investigate where the author has no reason to disbelieve his source is not supportive of malice. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). Local 690's ignorance of the location of the store, while relevant to a 'reasonable man' standard, does not satisfy the subjective standard of *St. Amant*. 390 U.S. at 731 (malice test requires that "defendant in fact entertained serious doubts as to the truth of his publication"). The Court should conduct an independent review of the record to decide if the judgment is consistent with the constitutional standard.

V. The Court Below Erred By Not Applying The Malice Fault Test Identified For Labor Libel Cases In *Letter Carriers v. Austin*, 418 U.S. 264 (1974), Where A Labor Union Asked Members Not To Patronize A Business With Whom Some Members Had A Dispute.

"Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1965). For that reason, the Court limited state court jurisdiction in labor libel cases to redressing libel issued with malice. 383 U.S. at 61. Here, a union publicized a 'do not patronize' message to promote the interest of its members who had experienced problems with Caruso while doing their jobs.

The court below applied the negligence test because the controversy in its view did not concern terms and conditions of employment (App. A-18). In so doing, the court failed to follow *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 279 (1974) ("labor dispute" statutory definition does not limit labor libel determination—*Linn* rule applies where federal labor policies protecting freedom of speech are significantly involved).

At stake here is jury regulation of how Local 690 justified its boycott request to its members. The danger is patent that the jury may have found against Local 690 because of its disapproval of the tenor of the language used or the justification Local 690 had for the boycott request. Both would impermissibly interfere with labor free speech. The *Linn* malice standard provides some protection from juror content regulation. The negligence test of fault applied below conflicted with *Linn* and *Austin*. This Court should review to clarify the occasions on which the malice standard applies to labor controversies.

CONCLUSION

The Court should grant certiorari to review the decision of the Supreme Court of the State of Washington.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT E. CARUSO,

Respondent,

v.

LOCAL UNION NO. 690 of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellant.

No. 51554-9

EN BANC

BRACHTENBACH, J.--A labor union appeals from a judgment of $244,000 in favor of a defamation plaintiff, raising instructional, juror challenge, and evidentiary issues. First, did the trial court err in submitting conflicting jury instructions on the elements of a defamation action and the burdens to be met by a defamation plaintiff, and assuming error, is reversal required where the jury nevertheless found the plaintiff met his highest burden and substantial evidence exists to support that finding?

Second, did the trial court commit reversible error in denying defendant's challenge for cause of a juror, where defendant exercised a peremptory challenge as to that juror, and defendant demonstrated no prejudice through his use of a peremptory challenge?

Third, was reversible error committed when the trial court admitted the following evidence: (1) deposition of the individual whose altercation with the plaintiff was the basis for the alleged defamation; (2) testimony by plaintiff's expert on the issue of causation of plaintiff's business losses; (3) testimony regarding anonymous phone calls received by plaintiff and his employees shortly after publication of the allegedly defamatory article?

We hold that none of the alleged error amounts to reversible error. Accordingly, we affirm the judgment.

In 1969, Robert Caruso opened a retail floor covering business in downtown Spokane known as "Linoleum & Carpet City". Caruso also owned a parking lot located three blocks from his retail business. He rented parking spaces on this lot to customers on a monthly basis.

Posted at the lot was a sign reading "Private parking. Violators will be towed."

On several occasions beginning in the summer of 1973, Caruso found access to the parking spaces on his lot blocked by delivery vans and trucks which were not authorized to be on his premises. On one such occasion he encountered a beer truck in which the keys had been left. Unable to locate the driver in nearby taverns, Caruso removed the keys from the truck and took them to his store. From there he called the owner, whose name was printed on the truck, and asked him to collect the keys and remove the vehicle.

In the meantime, the beer truck driver, Aleck Contos, who was a member of Local 690 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 690), had learned that Caruso had the keys.

Contos telephoned Caruso. After a heated exchange, Caruso informed Contos that he was going to have the truck towed. Then Caruso called the towing company.

Contos soon appeared at the parking lot, where Caruso was awaiting the tow truck. Contos protested the towing, became physically and verbally abusive, and threatened Caruso with retaliatory action by Local 690. In the midst of the general confusion which followed, Caruso received police intervention. Ultimately the beer truck was towed just far enough to remove it from the lot.

Shortly after these events, Contos related the incident to Mike Olds, an officer of Local 690. A few weeks later, the Washington Teamster, a union newsletter with a statewide circulation at that time of approximately 50,000, carried a "do not patronize" article

which is the focus of this controversy. Mike Olds wrote the article. It appeared in the November 9, 1973 newsletter as follows:

> Don't [P]atronize Carpet City in Spokane.
>
> This is to notify all members of Teamsters Union, Local 690 and all other Teamster and Laboring people in the State of Washington that when traveling to and from the Expo City--"please do not patronize Carpet City Carpet & Linoleum Shop at West 518 Main Avenue"--Spokane, Washington," [sic] (Expo City). The reasons for this request are: This Company is continuously harassing the Teamsters and other laboring people who may at some time use the parking facility at this place of business to make a delivery because of the congested traffic problems in Expo City since construction is going on mainly in that area. Someone from this Company removes the keys of such vehicles, have [sic] the equipment impounded and create [sic] many problems for these employees and their employers including the cost of impoundment to those effected [sic].
>
> This company will not cooperate with these drivers when told that they will move their equipment and apologize for parking in this

area--their equipment is still impounded.

We request that all Laboring people--Teamsters or otherwise--do not Patronize Carpet City Carpet & Linoleum Shop.

Thanks kindly for your Support.
Teamsters Union, Local 690.

Upon learning of this article's publication, Caruso attempted to contact Local 690. His calls were not returned and his efforts to meet with the union's business agent were unsuccessful. He then began to receive anonymous threatening phone calls. These calls continued over a period of 6 months to a year and apparently parroted the language of the article in the union newsletter.

Caruso became despondent. He feared for his own safety and that of his employees. His two key employees began to carry handguns. His business dropped off. Finally, the next year, he moved his retail outlet to a shopping center

north of town. He continues to operate at that location.

In December 1974, Caruso filed an action for business interference against Local 690. In April 1980, he amended his complaint to include defamation. Trail to a jury in March 1981 on both causes of action resulted in an award to Caruso of $102,000. The Court of Appeals affirmed in Caruso v. Local 690, Int'l Bhd. of Teamsters, 33 Wn. App. 201, 653 P.2d 638 (1982). This court reversed in Caruso v. Local 690, Int'l Bhd. of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983), holding that plaintiff could not prevail on his business interference claim after NAACP v. Claiborne Hardware Co., 458 U.S. 886, 73 L.Ed.2d 1215, 102 S. Ct. 3409 (1982) (boycott of white merchants by a coalition of blacks for purposes of bringing about political, social, and economic change was a

constitutionally protected activity). Because the award to Caruso had been based on unsegregated business interference and defamation claims, this court remanded for retrial of Caruso's defamation action.

The retrial, which was held in December 1984, resulted in a jury award of $295,000 to Caruso based on defamation. Since Caruso had previously settled with another defendant, the court entered judgment against Local 690 for $244,000. We accepted direct review.

I.

JURY INSTRUCTIONS

The jury found that Local 690 was liable for defamation, that the union's actions constituted malice, and that Caruso was damaged as a proximate result of the acts of the union. Local 690 contends that plaintiff failed to carry his burden on all elements of defamation

and that certain jury instructions were erroneous. Since most of the jury instruction error assigned by the union relates to specific defamation elements, the alleged error will be analyzed under each element.

"[A] defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages." Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982); Bender v. Seattle, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); Caruso v. Local 690, Int'l Bhd. of Teamsters, 100 Wn.2d 343, 352, 670 P.2d 240 (1983).

A. Falsity

Appellant assigns error regarding the falsity element to an instruction which appears to assign the burden of proving falsity to plaintiff while simultaneously giving defendant the burden of

proving substantial truth. In Mark v. Seattle Times, supra at 486 this court required a defamation plaintiff to prove falsity. Such a requirement was recently approved by the United States Supreme Court in Philadelphia Newspapers, Inc. v. Hepps, ___ U.S. ___, 89 L.Ed.2d 783, 106 S. Ct. 1558 (1986). In that case, the Court held that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." Philadelphia Newspapers, Inc., 106 S. Ct. at 1559.

Since it is settled that Caruso, as a private defamation plaintiff, has the burden of proving falsity, the challenged instruction is misleading to the extent it appears to assign simultaneous burdens to plaintiffs and defendant on this element.

The standard for sufficiency of jury instructions is set forth in Brown v. Spokane Cy. Fire Protec. Dist. 1, 100 Wn.2d 188, 194, 668 P.2d 571 (1983). Jury instructions are not erroneous if they "(1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." Brown, at 194. Since this instruction was misleading, under Brown, it was erroneous.

For erroneous instructions to require reversal, prejudice must be shown. Brown, at 196. Error is not prejudicial "unless it affects, or presumptively affects, the outcome of the trial." Brown, at 196. Here, even if the instruction had not been misleading, the outcome would have been different only if Caruso had offered insufficient evidence to carry his burden of proving falsity.

There must be "substantial evidence upon which the jury could have rested its verdict." Lillig v. Becton-Dickinson, 105 Wn.2d 653, 658, 717 P.2d 1371 (1986). Substantial evidence was defined by this court in Lillig as that which is sufficient "to persuade a fair-minded person of the truth of the declared premise." Lillig v. Becton-Dickinson, supra at 658 (quoting Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)).

In this case, the evidence was sufficient "to persuade a fair-minded person" that the article's statements were false. Caruso's evidence included testimony of his employees, both of whom testified that Caruso had never before removed keys from any vehicle or had any vehicle towed. Moreover, they testified that Caruso had an exemplary relationship with all the teamsters who delivered to

his store. In addition, a local tavern owner, who allegedly told the beer truck driver that Caruso habitually took keys and impounded vehicles, testified that he never made such a statement and had no knowledge of such behavior. Finally, the beer truck driver's deposition contained inconsistencies which bolstered Caruso's assertions of falsity. Since the evidence is sufficient, the outcome would not be different as to the falsity element, so there is no prejudice to defendant. Without prejudice, there is no reversible error.

B. Unprivileged Communication

In two unchallenged instructions, the jury was directed (1) that defendant had a qualified privilege to publish the statements, and (2) that defendant could only lose the privilege if it acted with malice. This is a correct statement of the law. See Bender v. Seattle, 99 Wn.2d

582, 601, 664 P.2d 492 (1983) (a defamation plaintiff must establish abuse of any qualified privilege by proving defendant acted with knowledge or reckless disregard as to the falsity of a statement). Accord, Turngren v. King Cy., 104 Wn.2d 293, 705 P.2d 258 (1985); Lillig v. Becton-Dickinson, supra. In any event, since these instructions are unchallenged, both the existence of a qualified privilege and the malice standard required to establish abuse are the law of the case.

Local 690 assigns error to an instruction which again appears to assign simultaneous burdens of proving the existence, nonexistence, and abuse of a qualified privilege. This is confusing to the extent it suggests that the burden of proving nonabuse of the privilege rests with defendant. Under Brown v. Spokane Cy. Fire Protec. Dist. 1, supra,

the confusion makes the instruction erroneous. However, the error is not reversible error under a Brown analysis unless the outcome of the trial would be different without the error.

Here, the outcome would not have been different, because the jury in fact found that Local 690 acted with malice. Moreover, there is substantial evidence in the record to support such a finding. Such evidence was offered through the testimony of Mike Olds, the union official who wrote the article in question. Olds testified that he never tried to corroborate the story about Caruso, that he never made any attempts to contact Caruso, and that he had no knowledge of prior complaints of any kind against Caruso. Furthermore, he did not know Caruso's parking lot was located three blocks from his retail store or that there was a second floor covering

business in Spokane owned by one of Caruso's relatives (Olds wrote a subsequent article to clarify which one of the Caruso retail stores was not to be patronized by teamsters). This testimony appears sufficient "'to persuade a fair-minded person'" (the Lillig standard) that Olds acted at least in reckless disregard of the truth of the story about Caruso.

C. Fault

Local 690 assigns error to various instructions which state that plaintiff must prove fault and that negligence is the proper standard. These instructions represent a technically correct statement of the law: "[i]f the plaintiff is a private individual, a negligence standard of fault applies." Caruso v. Local 690, Int'l Bhd. of Teamsters, supra at 352. Since Caruso is unquestionably a private

plaintiff, he was properly required to prove negligence.

Defendant argues, however, that error occurred because Caruso should have been required to meet a malice standard as to the fault element. This argument is unpersuasive for two reasons. First, the basis for malice, according to defendant, is that the defamation arose from a labor dispute, and thus is accorded "labor libel" treatment. However, a labor dispute is generally limited to controversies concerning "terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating . . . conditions of employment." 51A C.J.S. Labor Relations § 294 (1967). Terms and conditions of employment were not at the root of this defamation.

Second, the jury found malice for purposes of abuse of a qualified pri-

vilege in any event. Once plaintiff proves malice for purposes of the privilege element, it follows logically that he has proven malice for purposes of the fault element as well.

D. Damages

Local 690 assigns error to instructions which allowed the jury, if it found for plaintiff, to award damages for lost profits, emotional distress, and harm to reputation. Defendants argue this was error because the jury was not required to separate damages resulting from the "do not patronize" component of the article from damages caused by the defamation.

Defendant is correct that damages to plaintiff's business flowing from the "do not patronize" request are not compensable. See Caruso v. Local 690, Int'l Bhd. of Teamsters, supra. The jury could properly award damages in this

action only for defendant's conduct regarding defamation.

The instructions given the jury referred in many instances, to the "conduct" of the defendant. "Conduct", as referred to by the instructions, could be interpreted to include both the printing of the noncompensable "do not patronize" request and the compensable printing of the defamatory statements. We do not find, however, that the use of these instructions constitutes reversible error.

Jury instructions are to be considered in their entirety. Brown v. Spokane Cy. Fire Protec. Dist. 1, supra. Here, instruction 10 made it clear that this action was for defamation, and that "false statements of fact" must be a proximate cause of said damages. In addition, instruction 25 informs the jury that publication of a "do not patronize"

request is not actionable as long as it is lawful. Finally, instruction 2 makes it clear that "factual statements contained in the articles" are those alleged to be defamatory. Since a request would logically not be considered a "factual statement", the request not to patronize could not be interpreted as a defamatory statement. These instructions taken as a whole allowed the jury to award damages for defamation only.

A final jury instruction challenged by defendant relates not to defamation elements but to whether the article contained statements of fact or opinion. Defendant argues that if an instruction had properly characterized much of the article as opinion, the statements would have been nonactionable.

Even assuming the statements were opinions, this court's recent decision in Dunlap v. Wayne, 105 Wn.2d 529, 716 P.2d

842 (1986) disposes of defendant's argument that opinion is not actionable. Dunlap set forth three considerations for determining when opinion is actionable: (1) nature of the medium, (2) nature of the audience, (3) implication of undisclosed facts.

First, in this case the medium was the union newsletter. Its purpose presumably was to impart objective, helpful information. It was not akin to an editorial page. Second, the newsletter's audience had no reason to expect exaggeration. Readers were likely to believe the information printed therein, and they were likely to expect the publishers to act in the best interests of the readership. Finally, the article contained implication of undisclosed facts. The statements implied repeated acts and patterns of obstreperous behavior by plaintiff and suggested a

pattern of antagonistic behavior toward teamsters.

Under Dunlap, even if these statements were opinion they were nonetheless actionable. Local 690's challenge to the instruction regarding actionable opinion is thus without merit.

II

JUROR CHALLENGE

During voir dire examination, one prospective juror stated that she thought unions in this country were "too strong." She also said she and her husband had had unpleasant experiences with unions. As a result of these statements, defendants challenged her for cause. When questioned by the court as to her prejudices, the juror answered she felt she could be a fair and impartial juror, notwithstanding some of her anti-union feelings. Based on this dialogue, the judge determined there was insufficient justifica-

tion to excuse her for cause. Local 690 then exercised a peremptory challenge to prevent her from being seated.

State v. Latham, 100 Wn.2d 59, 667 P.2d 56 (1983) controls this issue. Latham states that a challenge for cause may be made for either implied or actual bias. However, even where a juror should have been removed for cause, the use of a peremptory challenge cures the error. The challenging party must then show that use of the peremptory challenge actually prejudiced his case.

Whether the juror in this case should have been removed for actual bias is arguable. Defendant, however, exercised a peremptory challenge, thereby curing any error. Moreover, defendant has demonstrated no prejudice through forced use of a peremptory challenge. Under Latham, then, there is no error.

III

EVIDENTIARY ERRORS

Defendant alleges three separate evidentiary errors. The admission or refusal of evidence is within the trial court's discretion and the court will only be reversed for abuse of discretion. Maehren v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938 (1981).

A. Contos' Deposition

Aleck Contos, the beer truck driver whose altercation with Caruso gave rise to the defamation, was apparently unavailable to testify at trial. His entire deposition was allowed to be read into the record, with one minor exception not relevant here.

Contos told his version of the parking lot dispute in his deposition. This testimony would have allowed a jury to conclude that he was a man with a

volatile temper who thought Caruso should have allowed him free access to the parking lot. The jury could also have inferred that Contos did not truthfully relate his encounter with Caruso to Mike Olds, author of the newsletter article.

Local 690 objected to the admission of those portions of the deposition which revealed Contos' actions toward Caruso. The union argued that such testimony was irrelevant to the establishment of malice on its part and even if relevant, it was unfairly prejudicial. The trial court ruled the entire deposition was relevant.

ER 401 defines relevant evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Here, Contos' testimony was relevant to the question of falsity, because what Contos

experienced with Caruso and what he later told the union gave rise to the defamation. Since falsity is an element to be proved in this case, its existence is certainly a "fact of consequence." Thus, this evidence is relevant.

ER 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Here, the danger was that the jury would see Contos, rather than Local 690, as the defendant. However, the union distanced itself from Contos through trial testimony. Moreover, Contos did not testify in person. Finally, extensive arguments on this issue were made by both parties and carefully considered by the trial judge. Under these facts, the probative value of Contos' deposition outweighed any unfair prejudice to Local 690.

B. Expert Testimony

Plaintiff presented an expert on the issue of business loss who had impressive educational and experience qualifications. The expert testified extensively and explained what losses Caruso had sustained and how he, the expert, had ascertained those losses. Finally, plaintiff's counsel asked the expert how he might determine a possible cause for such a business loss:

> Q As I understand your testimony, in answer to . . . [the] question [of defendant's counsel] you did go through this process of elimination; is that right?
>
> A That's correct. I tried to look at retail sales, so forth.
>
> Q Did you eliminate all of the potential causes for the drops that you have indicated?
>
> A To the best of my ability, I eliminated all but one.
>
> Q Which one?
>
> A The one -- the action on the Teamster's part that created some managerial problems for [Caruso] . . .

Verbatim Report of Proceedings, at 845-46. Counsel for Local 690 did not object during this dialogue. Following the expert's final answer, counsel approached the bench and defendant requested a mistrial due to unfair surprise.

The trial judge refused both a mistrial and striking of the testimony. He found that the direction in which the questioning was going was clear, and that there was sufficient time for an objection to be raised prior to the time the answer was given. In addition, the record reveals that defendant later asked its business expert the same question. Moreover, instruction 6 cautioned the jury that it was to weigh the testimony and judge the credibility of all witnesses, including experts. In light of these facts, there was no abuse of trial

court discretion in allowing plaintiff's expert's testimony on causation.

C. Anonymous Phone Calls

Caruso and his two key employees testified to receiving anonymous threatening phone calls at Caruso's store. Testimony revealed that the calls began within 1 week of publication of the article and continued with some frequency for 4 to 5 months and intermittently for 4 or 5 more months. All three of these witnesses testified that the calls were abusive and intimidating and placed them in fear for their personal safety.

Defendant argued against admission of testimony regarding these calls, contending this evidence was irrelevant because the callers could not be linked to Local 690. Plaintiff contended that evidence of the calls was relevant to damages. The calls contributed to the

anguish of plaintiff, to his preoccupation with his own safety and that of his family and employees, and to the drop in his business.

The trial court admitted the evidence, reasoning that a link, if any, between Local 690 and the callers was for the jury to find. To guard against unfair prejudice, the court allowed an instruction which limited the use to be made of evidence of the calls.

ER 402, requires that evidence be relevant to be admissible. There is no question that evidence of the calls was relevant. These calls contributed greatly to the depression and anxiety of the plaintiff. Such depression and anxiety, in turn, contributed to his business loss. Business losses made up a portion of the damages to be established by plaintiff.

ER 403, discussed above, would exclude otherwise relevant evidence which is unfairly prejudicial. Here Local 690's concern was that the jury would infer that the union initiated or sanctioned the anonymous calls. But there was no trial testimony which would imply such sanctioning or even knowledge. Moreover, counsel for plaintiff never tried to establish such a link. Finally, an instruction informed the jury that evidence of the calls was for a limited purpose. Under these circumstances, it was not an abuse of discretion for the trial judge to admit this evidence.

Under the foregoing analysis, we find no reversible error. The judgment is affirmed.

[Dolliver, C.J., Utter, J., Dore, J., Pearson, J., and Goodloe, J., concur.]

* * *

ANDERSEN, J. (dissenting) -- I agree with the majority that the trial court's instruction 10, the burden of proof instruction given to the jury in this case, is misleading and erroneous because it assigns simultaneous burdens of proving falsity to plaintiffs and defendants. I also agree with the majority that the same instruction is misleading and erroneous because it assigns simultaneous burdens of proving the existence, nonexistence and abuse of a qualified privilege. I disagree with the majority's conclusion, however, that these two errors are harmless. I would conclude that the burden of proof instruction's totally erroneous statements regarding qualified privilege, coupled with its falsity error, constitute prejudicial error and would remand the

case for a new trial before a properly instructed jury.

As I perceive them, the rules regarding the burden of proving a privileged communication in a defamation case are as follows. The defendant has the burden of establishing a privileged publication by proving a recognized public or private interest that would justify the utterance of the words. 1/ Whether or not a privilege exists at all is an issue of law for the court to decide. 2/ If the facts are in dispute, then the jury will be called upon to consider the evidence and pass upon the issues thus raised. 3/ It is for the

---

1/ W. Prosser, Torts § 115, at 796 (4th ed. 1971)

2/ W. Prosser, at 796; Restatement (Second) of Torts § 619, comment a, at 316 (1977).

3/ W. Prosser, at 796; Restatement (Second) of Torts, at 316.

court, however, to decide whether the facts found by the jury made the publication privileged or to instruct the jury as to what facts they must find to hold the publication privileged. [4/] Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication, by use of the occasion for an improper purpose or by lack of belief or grounds for belief in the truth of what is said. [5/]

In this case, the court did observe these rules in part when it instructed the jury as follows:

> You are instructed that the Defendant has a qualified privilege to publish and distribute the articles to Teamster Union members.
>
> In order to overcome that privilege, Plaintiff must show by clear and convincing evidence that the Defendant abused its privilege,

---

4/ Restatement (Second) of Torts, at 316.

5/ W. Prosser, at 796.

> and that the Defendant knew the statements were false, or acted in reckless disregard of whether the statements were true or not.
>
> Reckless conduct is defined in Instruction No. 16.[6]

The trial court's instruction 10, however, is inconsistent and contradictory with the foregoing correct statement of the law. It reads:

> The plaintiff has the burden of proving each element of the cause of action for defamation, which are as follows:
>
> 1. That the defendant made false statements of fact concerning the plaintiff.
>
> 2. That the defendant made this statement to a third party without privilege to do so.
>
> 3. That the defendant was at fault, amounting to at least negligence.
>
> Plaintiff has the burden of proving that the defendant made one or more statements alleged by the plaintiff, that the plaintiff suffered damages as alleged and that the statements were a proximate cause of said damages.
>
> If the plaintiff fails to prove any one of the foregoing elements, then your verdict must be for the defendant on plaintiff's claim for

---

6/ Instruction 18.

> defamation. If, however, plaintiff proves his case, the defendant has the burden of proving the following defenses:
>
> 1. That the statements of fact were substantially true; truth is a complete defense to an action for defamation.
>
> 2. That the defendant had a qualified privilege to make these statements. 7/

It is impossible to know what effect inconsistent or contradictory instructions may have upon a jury. 8/ Instruction 10 raised the issue of whether a privilege existed and assigned simultaneous burdens of proof on the issue, while instruction 18 treated the existence of a privilege as settled and assigned plaintiff the burden of proving its abuse. Instruction 10 is not a correct statement of the law and could

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7/ Instruction 10.

8/ Hall v. Corporation of Catholic Archbishop, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); Matteson v. Thiel, 162 Wash. 193, 197, 298 P. 333 (1931).

well have served to nullify Instruction 18 in the jurors' minds. I would hold that instruction 10, the erroneous burden of proof instruction, imparted prejudicial error into the case requiring a new trial.

Accordingly, I dissent.

[Durham, J., and Callow, J. concur]

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SPOKANE COUNTY

ROBERT E. CARUSO,

Plaintiff,

v.

TEAMSTERS LOCAL 690,

Defendant.

No. 221735

AMENDED JUDGMENT

THIS MATTER having come before this Court upon the Motion of Plaintiff, through his counsel, Joseph J. Ganz; the jury in the above-captioned cause having rendered its verdict in favor of the Plaintiff, Robert E. Caruso, in the sum of $295,000.00; the Court having determined that said amount is reduced by prior partial payment;

FURTHER, that the Court, after hearing Defendant's motion to amend

verdict, having determined that the interest rate in the original judgment was erroneous and must be corrected; it is hereby

ORDERED , that Robert E. Caruso has judgment against the Defendant, Teamsters Local 690 in the principal sum of $244,000.00, together with statutory costs and attorney's fees in the sum of $201.29, together with interest on said amount at 12.48% per annum from this date until fully satisfied.

DATED this 18th day of March, 1985.

John A. Schultheis
JUDGE

APPENDIX C

INSTRUCTION 10

The plaintiff has the burden of proving each element of the cause of action for defamation, which are as follows:

1. That the defendant made false statements of fact concerning the plaintiff.

2. That the defendant made this statement to a third party without privilege to do so.

3. That the defendant was at fault, amounting to at least negligence.

Plaintiff has the burden of proving that the defendant made one or more statements alleged by the plaintiff, that the plaintiff suffered damages as alleged and that the statements were a proximate cause of said damages.

If the plaintiff fails to prove any one of the foregoing elements, then your

verdict must be for the defendants on plaintiff's claim for defamation. If, however, plaintiff proves his case, the defendant has the burden of proving the following defenses:

1. That the statements of fact were substantially true; truth is a complete defense to an action for defamation.

2. That the defendant had a qualified privilege to make these statements.

INSTRUCTION 11

Although the defendant may have the burden of proving that the articles of which plaintiff complained are substantially true, the law does not require that they prove the articles were meticulously or exactly true in all respects. The differences may be differences of no consequence.

INSTRUCTION 18

You are instructed that the Defendant has a qualified privilege to publish and distribute the articles to Teamster Union members.

In order to overcome that privilege, Plaintiff must show by clear and convincing evidence that the Defendant abused its privilege, and that the Defendant knew the statements were false, or acted in reckless disregard of whether the statements were true or not.

Reckless conduct is defined in Instruction No. 16.

INSTRUCTION 20

Plaintiff must prove that Defendant was negligent in publishing the articles. You may find Defendant negligent only if you find that the Plaintiff proved with convincing clarity that Defendant knew or, in the exercise of reasonable care, should have known that the factual statements were false in some substantial way, or would create a false impression in some material respect.

APPENDIX D

Motion To Dismiss At End Of Plaintiff's Case [Excerpt - Tr. 869-870]:

Separately, it is the law that we have a right -- a constitutional right to boycott, to cause a boycott of this firm for the reason that they were hassling, in our view, drivers. We have a constitutional right to do that. There's no evidence, credible or otherwise -- and I might, at this -- let me back up. This point has not been addressed in this litigation. The point I present to the Court now has not been addressed.

We have a Supreme Court decision of our state that the boycott activity was constitutionally protected. Now, I submit it is clear that the Court or a jury cannot be permitted to return a verdict of damages against the defendant where the evidence clearly indicates one important component of the alleged hurt

was constitutionally protected conduct. The federal case law on this is legion. One of the earliest cases was a boycott case, which I had the fortune or misfortune to try, and eventually went to the Supreme Court, called Morton (phonetic) against Teamsters. The later cases in the federal sector, Austin Letter Carriers, these are the First Amendment libel cases, then our Washington Supreme Court in a tort case, Henderson, all of this whole line of cases clearly say that where there is a federally protected course of conduct, and a concurrent, or intermeshed, or whatever you want to call it, course of conduct amenable to regulation, be it damages or other, by state law, that there is a burden to segregate out the federally protected constitutional statute authority from the area where the state does have the jurisdiction. There is no way a jury -- this

jury in this case can segregate on plaintiff's case, and plaintiff has the burden of proof between constitutionally protected rights and the cases that the Court might conclude to be amenable to regulation under the libel law of the State of Washington.

If the jury were permitted to take this case, as it stands, they inevitably and unmistakably would be allowed to award damages based in part on constitutionally protected conduct. Because the plaintiff failed to make any effort whatsoever to segregate the impact of constitutionally protected conduct versus that area of conduct or those events which are not constitutionally protected, there's a total failure of essential proof.

Motion To Dismiss At Close Of Trial
[Excerpt - Tr. 1062-1063]:

At this time, the defense renews its motion for dismissal on the grounds that

have been previously stated at the close of plaintiff's case-in-chief. Simply by way of reminder, that includes the enumerated grounds, then each of the contentions set forth in the two memoranda, the trial brief and the summary judgment brief.

Exceptions To Instructions
[Excerpts - Tr. 1168-1170; 1172-1173]:

Our first objection is to Instruction No. 2, specifically the last three lines, "And in addition, defendant claims as an affirmative defense the statements contained in said articles were true and privileged." We believe that that portion of Instruction No. 2 misallocates the burden of proof, and that the cases hold that the burden of proof on all elements is on the plaintiff.

We have no objections to Nos. 3 through 9. We object to portions of Instruction No. 10. First, point 3,

numbered paragraph 3 of Instruction No. 10, which says "That the defendant was at fault, amounting to at least negligence," which says that the plaintiff has the burden of the element of fault, which in this case the Judge has indicated is negligence. We have submitted before now that the proper fault test in this case is that of actual constitutional malice. We have raised that issue in summary judgment and at our motion to dismiss very briefly. The basis for that motion is that this is a labor libel case controlled by the Linn and Austin cases.

Secondly, that this case involves alleged defamation, which is not facially defamatory and does not make danger to reputation apparent. And under the Gertz case and under the Taskett,

T-A-S-K-E-T-T, case, the test should be greater than that of negligence.

. . .

Lastly on Instruction No. 10, we object to the last two numbered paragraphs as follows:

1. That the statements of fact were substantially true; truth is a complete defense to an action for defamation.

2. That the defendant had a qualified privilege to make the statements.

We object that, again, we believe they misallocate the burden of proof onto the defendant instead of on the plaintiff.

Next, on Instruction No. 11, which addresses that issue of substantial truth, we object to the giving of this instruction as it misallocates the burden

of proof to the defendant instead of to the plaintiff, where it belongs.

. . .

Instruction No. 20 states the negligence standard for the fault element. Our objection to Instruction No. 20 is that it does not state the actual malice standard for fault. Again we have addressed this point in summary judgment and in the various motions to dismiss, and I addressed the actual malice issue, and there are three reasons why it should apply earlier in my recitation here. I will not belabor that at this point.

APPENDIX E

Assignments Of Error
[Local 690 Opening Brief pp. 1-3]:

1. The trial court erred in entering judgment and in denying Local 690's motions to dismiss and for judgment n.o.v. on the ground that there was no clear and convincing evidence that Local 690 published with constitutional malice.

. . .

5. The trial court erred in entering judgment and in denying Local 690's motions to dismiss, for judgment n.o.v. and for new trial on the grounds that there was no evidence segregating damages caused by the protected "do not patronize" message from damages caused by allegedly defamatory portions of the articles.

. . .

11. The trial court erred by giving instruction No. 10.

12. The trial court erred by giving instruction No. 11.

. . .

14. The trial court erred by giving instruction No. 20.

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SPOKANE COUNTY

ROBERT E. CARUSO,

Plaintiff,

v.

TEAMSTERS LOCAL 690,

Defendant.

No. 82-2-10107-9

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL, AND TO AMEND JUDGMENT

Pursuant to CR 50 and CR 59, defendant Local 690 moves for judgment notwithstanding the verdict, and in the alternative for a new trial and for an amended judgment.

The basis for the motion for judgment notwithstanding the verdict is that there is insufficient evidence on which to justify the verdict that Local 690 acted with actual, "constitutional"

malice. The verdict is contrary to law and denies substantial justice to Local 690.

The basis for the motion for new trial are that the only evidence as to causation of damages was improperly admitted over objection after Plaintiff indicated its expert witness would not testify to causation; that there was no evidence segregating damage from the legal boycott message from damage due to the alleged libel; and that the damage award was excessive. CR 59(a),(1),(2),(3),(5),(7),(8),(9).

The basis for the motion for amended judgment is that the court incorrectly set the interest rate in the judgment.

The motion is accompanied by a memorandum and the affidavit of Richard H. Robblee.

DATED THIS 19th day of February, 1985.

Richard H. Robblee
HAFER, PRICE, RINEHART
& SCHWERIN
Attorneys for Local 690

APPENDIX - G

No. 221735

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

ROBERT E. CARUSO,

Plaintiff,

v.

TEAMSTERS LOCAL 690,

Defendant.

Order on Post-Judgment Motions

The Court having reviewed Defendant's Motion for Judgment Notwithstanding the Verdict, For New Trial, and to Amend Judgment, the affidavits of Richard H. Robblee and Joseph J. Ganz, and the Memorandum in Opposition to the Support of Post-Judgment Motions, and having considered the oral argument of both counsel, makes the following ORDER:

1. Defendant's motions for judgment notwithstanding the verdict, and for new trial, are denied.

2. Defendant's motion to amend judgment is granted. The judgment interest rate shall be set at 12.48%.

DATED this 18th day of March, 1985.

_____

John A. Schultheis
Judge

Supreme Court, U.S.
FILED
JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1619

In The

Supreme Court of the United States

October Term, 1986

LOCAL UNION NO. 690,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Petitioner,

v.

ROBERT E. CARUSO,

Respondent.

RESPONSE TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported at 107 Wn.2d 524 and 730 P.2d 1299 (1987).

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JURISDICTION

The court below affirmed judgment on January 8, 1987. No rehearing was requested. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

———o———

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

———o———

STATEMENT OF THE CASE

The Plaintiff below, Robert E. Caruso, ran a retail floor covering business under the name of "Linoleum and Carpet City" in the city of Spokane, Washington, located at West 518 Main Avenue, from 1970 until 1978. The only parking place available to that business in October and November 1973 was the loading zone in the front of the business.

Caruso also owned a parking lot approximately one-quarter of a mile from this place of business where he rented spaces on a monthly basis to members of the general public. Prior to the incident which gave rise to the defamatory publications by the defendant Teamsters Local 690, Caruso had never before taken the keys from a vehicle; nor caused any vehicle to be impounded. Caruso had always run a Union shop and the truck drivers who delivered to Caruso's place of business enjoyed an exemplary relationship with Caruso.

On the morning of October 26, 1973, when Caruso attempted to park his car in the parking lot one-quarter mile away and totally separate from his business, he discovered a large beer truck and a smaller TV van in the lot blocking the entrance. Caruso tried unsuccessfully to locate the driver; and noticed the beer truck was unlocked and that the keys had been left in the ignition. Caruso conducted a search of the neighborhood taverns in order to find the driver of the truck to no avail. In order to prevent a theft of the truck Caruso took the keys, secured the truck, and went to his place of business. Caruso immediately telephoned the owner of the truck and asked him to pick up the keys and remove the truck from the private posted parking lot.

Shortly thereafter Caruso received a telephone call from an Aleck Contos, the truck driver, who was very excited and angry and proceeded to call Caruso vile names.

Caruso called a towing company and proceeded back to the lot where the driver of the TV van settled his share of the towing costs and departed. Contos refused to agree to any settlement and threatened bodily harm to Caruso.

Contos stated he had just reported Caruso to the Teamster's Union and that the Teamster's Union would break him and cost him tens of thousands of dollars. Contos further testified at trial that he wanted to punish Caruso.

Caruso summoned the police, gave the officers the keys to the beer truck. Complained to the police that the beer truck was trespassing upon posted private property. On November 9, the following article was published on the front page of the Washington Teamster surrounded by a black border:

> DON'T PATRONIZE CARPET CITY IN SPOKANE.
>
> This is to notify all members of the Teamsters Union, Local 690, and all other Teamsters and laboring people in the State of Washington that when traveling to and from Expo City—"please do not *patronize Carpet City Carpet & Linoleum Shop,* at West 518 Main Avenue—Spokane, Washington [sic] (Expo City). This company is continuously harassing the Teamsters and other laboring people who may at some time use the parking facility at this place of business to make a delivery because of the conjested traffic problems at Expo City since construction is going on mainly in that area. Someone from this company removes the keys of such vehicles, have [sic] equipment impounded and create [sic] many problems for these employees and their employers including the cost of impoundment to those affected. [sic].
>
> This company will not cooperate with these drivers when told that they will move their equipment and apologize for parking in this area—their equipment is still impounded! We request that all laboring people—Teamsters or otherwise—*do not patronize Carpet City Carpet & Linoleum Shop.* Thanks kindly for your support, Teamsters Union Local 690.

This article was published twice in the November 9th issue 1973.

Following the publication of that article Caruso went to the Teamsters Union for the purposes of discussing the article. Although he went on several occasions on each occasion he was told that the author of the article was out. He left his business card but was never called or contacted in any way by Mike Olds, the author of the article. Simultaneously with Caruso attempting to contact the Teamsters Union, his uncle, also named Caruso, who also owned a retail carpet and linoleum shop in Spokane, Washington, but at a different address, also contacted Mike Olds of the Local 690 and advised him that he had been a friend of labor for many years and that he felt that the article could be confused because of the similarity in names and the fact that Robert Caruso, the plaintiff below, was his nephew.

On November 30, 1973, again in two places in the Washington Teamster similar articles were published. However, on the second printing the articles made very clear the fact that they did not target the linoleum shop owned by the plaintiff's uncle, and then specifically identified Linoleum and Carpet City at 518 West Main Avenue, followed by exactly the same language regarding the continuous harassment, etc., as was contained in the November 9th article.

These articles were widely distributed to universities, libraries, members of charitable organizations, business people, both active and retired Teamsters, as well as to other local businesses in the city of Spokane.

Immediately after the publication of the articles, Caruso began receiving anonymous and threatening phone calls. His life was threatened as well as the life of family members. Some callers told Caruso to get in touch with Mike Olds of the Teamsters Union and told to tell him Caruso's side of the story because the articles were very damaging to Caruso's business. Caruso, as indicated, made several efforts to contact Olds by leaving phone messages, business cards, but Olds never returned the calls or made any attempt to contact Caruso. When Caruso and Gary Sparks, an employee, made a personal visit to Local 690's offices to contact Olds, they were advised that he was not in again. At trial Mr. Olds testified that his employees did not relay Caruso's repeated messages and did not deliver the business cards left for him.

As a result of the pressures brought to bear upon Caruso by the Teamsters, Caruso became despondent and failed to concentrate upon his business. He lost a key man because of the continuous threats to the life of both Caruso and fellow employees. Immediately after the publication of the articles, Caruso's sales dropped dramatically and experts retained by Caruso testified that Caruso had suffered in excess of $450,000 in lost profits. Pursuant to the directions of the Supreme Court of the State of Washington in *Caruso v. Teamsters Local 690,* cited at 100 Wn.2d 343, 670 P.2d 240 (1983), the jury was instructed on the negligence standard. The court further instructed that Local 690 had a qualified privilege to publish to union members. The court further instructed the jury that Caruso had the burden of showing by clear and convincing evidence that Local 690 abused its privilege by publishing with constitutional malice, on which the court instructed the

jury. The Teamsters did not take exception to this instruction.

At the second jury trial in 1984, the jury, answering special interrogatories, held that the Teamsters were liable for defamation of Caruso; that the actions of the Teamsters constituted actual malice pursuant to the appropriate instruction, which was not objected to by the Teamsters; that Caruso was damaged as a proximate result of the acts of the Teamsters in the amount of $295,000.00.

———o———

REASONS FOR NOT GRANTING THE WRIT

I. RESPONSE TO PETITIONER'S POSITION SUPPORTING THEIR REQUEST GRANTING WRIT OF CERTIORARI

The jury was instructed that malice must be proved by "clear, cogent and convincing evidence" (Instruction No. 17). The application of "convincing clarity" test as opposed to the "clear, cogent and convincing" test as instructed is an exercise in redundancy. The Supreme Court of Washington reviewed the record in depth as to defamation, falsity, malice and damages in light of the evidence on the record.

Whether the standard is clear, cogent, and convincing evidence or convincing clarity, the overwhelming evidence of malicious defamation presented to the triers of fact and reviewed by the appellate court are sufficient to support

the verdict below, without harm to the spirit of *Bose Corp. v. Consumer Union,* 466 U.S. 485, 510 (1984). It must be remembered that Caruso was a private individual and in no sense of the word a public figure or a public official. False factual statements that cause private injury are not protected by the first amendment, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel,* 425 U.S. 728, 777, 96 S. Ct. 1817 (1976). Untruthful speech is never protected for its own sake (*Id.* at 771). In its review of the evidence the Washington State Supreme Court found innumerable factual falsehoods:

A) The charge that Caruso was continuously harassing the Teamster at his place of business, was found to be a blatant falsehood. The *only* testimony that Caruso had "harassed" anyone at his place of business was vehemently denied by Caruso and was based solely on the testimony of a former Teamster agent who categorically changed his testimony between the first trial and the second trial as a result totally lost credibility. There was absolutely no evidence that Caruso was harassing other laboring people and was a complete fabrication.

B) The parking incident with Contos did not occur at 518 West Main, a factual falsehood which The Teamsters admitted. The keys were never removed from more than one vehicle and The Teamsters admitted this factual allegation was false. There was absolutely no evidence at the trial, nor any evidence found in the record which supported the allegation that the company would not cooperate with drivers and was a blatant falsehood. The only testimony for a review by the Supreme Court of the State of Washington was from persons who stated that

Caruso's relationship with the Teamsters who delivered to his place of business were exemplary.

C) The allegation that the drivers apologized after being asked to remove their trucks was a factual falsehood unsupported by a scintilla of evidence. In fact, the only evidence was that as a result of the complaint Caruso was threatened with bodily harm and financial ruin. (Hardly an apology). In addition to the above, the demeanor of the witnesses and their credibility remains subject more appropriately before the jury and the trial court even though the silent record is reviewed by the appellate court.

In addition to the above, the evasive responses of Mike Olds, the author of the articles, throughout his testimony as well as his admission that at the time he wrote the articles he knew that the incident complained of had not taken place at Caruso's place of business, and in addition there was only one incident involving keys (in total contradiction of the article's content), as well as the testimony of a local tavern owner (who Olds testified told him that Caruso habitually took keys and impounded vehicles) testified that he never made such a statement and had no knowledge of such behavior and had never talked to Olds at all. Finally, in the review of the record the Supreme Court found, in addition to the above, substantial inconsistencies in the testimony of Aleck Cantos, the truck driver, which bolstered the overwhelming evidence of falsity and malice.

Again, in reviewing the record without regard to the demeanor or the credibility of the witnesses, the Supreme Court had before it in the record the absolute admission of the author of the articles that at the time he wrote the

articles he had no information about other laboring people being harassed at the store downtown and that he had no knowledge about anything which happened at this place of business. These are admissions that the articles were published with the knowledge of their falsity and in total disregard as to their truth.

Contrary to the statements of the petitioner, the Supreme Court of the State of Washington, reviewed the record, pursuant to the guidelines of *Bose Corp. v. Consumer Union. Bose* doesn't require the appellate court to disbelieve the witnesses for the plaintiff, but to ascertain whether there was clear and convincing evidence, which if believed, would support the verdict, which they did.

The scope of review outlined in *Bose,* did not deter the necessity or the appropriateness of the trier of fact in its examination of the demeanor and credibility of witnesses. The jury which had the opportunity to review the witnesses found that Olds deliberately falsified the articles and published them with constitutional malice. The trial judge who also had the opportunity to review the demeanor of the witnesses was of the opinion that there was clear and convincing evidence to support the finding of the jury. The testimony of Olds himself, the author of the article, is clear and cogent evidence from which the jury and the reviewing appellate court concluded that Olds published the articles with reckless disregard of the truth. Petitioner cites *St. Amant v. Thompson,* 390 U.S. 727, 732-733 (1968), arguing that reliance on one source and failure to verify information held insufficient to show malice was inappropriate. In that case the Supreme Court of the United States indicated that there was no one single

infallible way of proving malice. Consequently, courts have articulated a number of factors of conduct and state of mind which are probative particularly when taken together adding up to clear and convincing proof of reckless disregard for the truth. Under *St. Amant,* the inherent improbability of the defendants story, which entails an evaluation of the defendants demeanor is certainly relevant to show 'reckless disregard of the truth. Reliance upon obviously unreliable sources such as the Teamsters purported reliance upon the excited and angry Contos is probative of malice. The absence of a "hot news" deadline, which is evidenced by a republication in the instant case is probative of the defendants actual malice: *Carson v. Allied News,* 529 F.2d 206, 211 (7 Cir. 1977). It is previously noted the defendants lack of credibility is probative of actual malice: *Davis v. Schuchat,* 510 F.2d 731, 736 (D.C. Cir. 1975); *McManus v. Doubleday & Company,* 513 F. Supp. 1383, 1389 S.D.N.Y. (1981). Post publication acts such as failure to retract, and in the instant case the refusal to discuss the situation with Caruso may be probative of pre-publication actual malice. *Herbert v. Lando,* 73 F.R.D. 387, 396-397; *Church of Scientology of California v. Dell Publishing,* 362 F. Supp. 767, 770 (N.D. Cal. 1973). The Teamsters refusal to discuss the situation with Caruso was corroborative evidence of malice as it underscores the grossly irresponsible manner of publication which is synonymous with reckless disregard of the truth. Together with the admissions of actual knowledge of the falsehood of the factual statements, the proof of malice in this case is overwhelming, and in review of the complete record the Supreme Court of the State of Washington so found.

II. HARMLESS ERROR

The Supreme Court in its review of the instructional error related said error to specific defamation elements and analyzed each element.

With regard to the element of falsity the Washington court found Caruso was a private defamation plaintiff and had the burden of proving falsity. The court further found that the instruction was misleading to the extent that it appeared to assign simultaneous burdens to the plaintiff and the defendant on the element of falsity. Having found the instruction erroneous the court further stated that in order to require reversal prejudice must be shown. (A12). The test followed by the Washington Supreme Court was whether or not error affected or presumtively affected the outcome of the trial (A12). In answer to this inquiry the court said:

> Here, even if the instruction had not been misleading, the outcome would have been different only if Caruso had offered insufficient evidence to carry his burden of proving falsity.

The court in review of entire record found substantial evidence of falsity. (A13). The Supreme Court point-out that the evidence included testimony of Caruso's employees who testified that Caruso had never before removed keys from any vehicles or had any vehicles towed, however, they pointed out the testimony that Caruso had exemplary relationships with all the Teamsters who delivered to his store, that in addition, the local tavern owner who allegedly told the beer truck driver that Caruso habitually took keys and impounded keys testified that he had never made such statements, the admissions of the

author himself as to his actual knowledge that certain statements made in the articles were false, known to be false by him at the time of publication.

In regard to the instruction on privilege, Washington Supreme Court found that the instruction assigned simultaneous burdens of proving the existence, non-existence, and abuse of the qualified privilege. Upon this finding the court found the instruction to be confusing and erroneous and again applied the harmless error analysis found as follows:

> Here, the outcome *would not have been different* because the jury in fact found that Local 690 acted with malice. (A-14)

Moreover, there is substantial evidence in the record to support such a finding. Such evidence was offered through the testimony of Mike Olds, the union official who wrote the article in question. Olds testified that he never tried to corroborate the story about Caruso, he never made any attempts to contact Caruso, and that he had no knowledge or prior complaints of any kind against Caruso. Furthermore, he did not know Caruso's parking lot was located three blocks from his retail store or that there was a second floor covering business in Spokane, owned by one of Caruso's relatives. His testimony was inconsistent and other evidence was overwhelming, clear, and convincing that these statements were untrue. After review of the complete record that was the finding of the Supreme Court of Washington.

State appellate courts reasonable application of a constitutionally proper state harmless error rule to sustain no prejudice finding constitutes an independent and

adequate state ground of judgment. *Viator v. Stone,* 336 U.S. 948.

III. SEGREGATION OF DAMAGES

Local 690 assigned error to instructions which allowed the jury if it found for plaintiff to award damages for lost profits, emotional distress and harm to reputation. The petitioners argue that this was error because the jury was not required to separate damages resulting from the "do not patronize" component of the article from damages caused by the defamation.

The Supreme Court of Washington found that petitioner was correct in asserting the damages to plaintiff's business flowing from the "do not patronize" request were not compensable. (A19). The court cited *Caruso v. Local 690, International Brotherhood of Teamsters, supra.* The court found after a review of the complete record and all of the instructions that the jury could properly award damages in this case *only* (emphasis mine) for the defendants conduct regarding defamation.

In reviewing the instructions the Supreme Court of Washington found that the instructions referred to the "conduct" of the defendant.

The court further found that "conduct," as referred to by the instructions, could be interpreted to include both the printing of the noncompensable "do not patronize" request and the compensable printing of the defamatory statement. The court specifically found that the use of those instructions did not constitute reversible error.

Referring to Instruction 10 the Supreme Court of Washington concluded that the instruction made it clear

that the action was for defamation, and that the "false statements of fact" must be a proximate cause as to the damage. In addition, the court referred to Instruction 25 which informed the jury that the publication of a "do not patronize" request was not actionable as long as it was lawful. Finally, the court in reference to Instruction 2 made it clear that "factual statements" contained in the articles are those alleged to be defamatory. In evaluating these instructions as a whole the court in its review found that a request would logically not be considered a factual statement, the request not to patronize could not be interpreted as a defamatory statement. Those instructions taken as a whole allowed the jury to award damages for defamation only (A-21). At trial The Teamsters testify there were no handbills nor pickets nor other communications circulated regarding "do not patronize" except for the malicious libels published in the Washington Teamster.

In the abstract the so-called "protected phrase"—do not patronize when appended to and integrated with a series of malicious falsehood, enjoys no constitutional immunity. The Teamsters take the novel proposition that protected language is constitutionally immune because the protected message is hopelessly comingled and published as an integral part of malicious falsehoods.

This absolutist view of the First Amendment has been repeatedly rejected by the Supreme Court. This is essentially the holding of the court in *Milk Wagon Drivers v. Meadowmoor Dairy's Inc.*, 312 U.S. 287, 294, 85 L. Ed. 836, 61 S. Ct. 552 (1941):

> In an extreme case, unprotected activity may be so pervasive that all damages are found to flow from the unlawful rather than the protected activity.

Caruso's theory was that all of the damages flowed from the unlawful activity of publishing malicious libels and the jury agreed. As previously indicated by the Supreme Court decision (A-21) the jury was instructed in Instruction 25 that the publication of a "do not patronize" request is a legitimate exercise of a person's right to free speech and is not in and of itself actionable so long as it is done in a lawful manner. Cases cited by the petitioner do not support the Teamster's position that boycott damages are not recoverable. The clear holding of the court in *NAACP v. Clairborne Hardware,* 458 U.S. 886 is that the illegal activity is not protected. That case is not support for the position that a "do not patronize" message is "protected" when it is published in such a way that the message is permeated with malicious libels.

In the court below, Caruso did not seek damages caused by protected speech. Caruso sought compensation for damages caused by malicious libel. The jury found on the basis of clear and convincing evidence that The Teamsters maliciously published defamatory falsehoods. The fact that these malicious falsehoods are appended to one or two words that might be constitutionally protected in a different context does not mandate a different result.

IV. LABOR LIBEL

Petitioner argues that the error occurred because Caruso should have been required to meet a malice standard as to the fault element. The Supreme Court of Washington (A-18) found that this argument was unpersuasive

for two reasons: First, the basis for malice according to The Teamsters was that the defamation arose from a labor dispute and thus accorded "labor libel" treatment. The Supreme Court of Washington pointed out that the labor dispute is generally limited to controversies concerning "terms, tenure, or conditions of employment, or concerning the association and representation of persons in negotiating . . . conditions of employment." 51 *A.C.J.S. Labor Relations* § 294 (1967). The Appellate Court specifically found that the terms and conditions of employment were not at the root of this defamation.

The Supreme Court again, after reviewing the complete record found malice for the purpose of abuse of a qualified privilege in any event and that once the plaintiff proved malice for purposes of the privilege element it followed logically that he had proven malice for the purposes of the fault element as well. (A-18-19)

Even in light of the analysis as to whether or not the basis of this defamation involved a "labor controversy" The Teamsters continue to contend that this dispute was a "labor controversy" within the parameters of certain federal policy concerns. The only basis for a dispute was the fact that a Teamster, Aleck Contos violated the law by trespassing on posted private property and further violated the law by leaving keys in an unattended vehicle.

There was no primary labor dispute between The Teamsters and Caruso. Caruso's relationship with his union employees and Teamsters who delivered to his place

of business was exemplary (A-13). There was no secondary labor dispute between the parties because there was no legitimate labor union activity involved in this case. The only dispute involved here was The Teamsters' assertion that they had the right to control the property rights of private persons and financially punish anyone who chose to exercise the right to call the police when trespass upon property was discovered.

The only "condition of employment" involved in this case was Mr. Contos' trespass and flagrant disregard of the law which prohibits leaving keys in unattended vehicles. The Teamsters urge that a labor union boycott message enjoys absolute constitutional protection. *NAACP v. Clairborne Hardware Co.* does not support The Teamsters. In *Clairborne Hardware* the court held very explicitly that the award for damages "resulting from boycott" could not be sustained when the evidence disclosed that all of the business losses were not proximately caused by violence or threats of violence; i.e., illegal or unprotected activity.

The Federal Labor Policy regarding union boycotts is expressly articulated in 29 U.S.C. 158(b)(4), the so-called "publicity" provision of the National Labor Relations Act. Section 8(b)(4) of the NLRA prohibits secondary boycotts but this "publicity provision" states:

> . . . nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purposes of *truthfully* advising the public, including consumers and members of a labor organization that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer as

> long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods . . . [emphasis added].

DeBartolo Corp. v. N.L.R.B., 103 S. Ct. 2926 (1983).

In *Clairborne* the court, after discussing *Mineworkers v. Gibbs*, 383 U.S. 715 at some length explained that in *Gibbs* a plaintiff has been permitted to recover under state law so long as the recovery was confined to the strict consequences of illegal conduct. In *Gibbs* the illegal conduct was violence. The court goes on to state:

> The careful limitation on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. The limitation is no less applicable, however, to the important first amendment interest at issue in this case. Petitioners withheld their patronage from the White establishment of Clairborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a civil war to secure. While the state may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of non-violent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered. (At p. 918.)

In other words, even pure speech is unprotected when it takes the form of malicious libel. Non-violent malicious libel is not protected activity in any sense of the word. And this is particularly true when the "right" which the defendant asserts is not a challenge to a political and economic system which denies them basic dignity, but is

insisting upon an immunity from a legitimately enacted local ordinance because they are a labor union.

The Teamsters argue that a broad and liberal reading of the dicta in *Hasbrouck v. Sheet Metal Workers*, 586 F. 2d 691 (9th Cir.) requires the court to conclude that any dispute with a labor union is a labor dispute. This sweeping interpretation is well answered by the Supreme Court in *DeBartolo* (at p. 2932) which may be paraphrased as follows: If Congress had intended every traffic dispute between a Teamster and a private citizen should ipso facto become a "labor dispute," Congress would have said so.

The Teamsters contend that they have an absolute right to financially punish Caruso by the use of malicious libel because of one of their members had a "labor dispute" with Caruso. *Eastex v. N.L.R.B.*, 437 U.S. 556 does not hold that labor's cause advanced by transgressing upon private property rights and circulating malicious libels when the police are called. *Eastex* involved the distribution of information to members and perspective members—and was legitimate, concerted union activity. Here both the alleged "grievance" and The Teamsters response involved violations of the law.

Nor do any of the opinions in *Old Dominion v. Austin*, 418 U.S. 264 support The Teamsters' contention that they have an unqualified right to use malicious libel in any dispute which they choose to characterize as a "labor dispute." This view is further enhanced by the holding of the Ninth Circuit in *Shelly v. Anderson Furniture Co. v. N.L.R.B.*, 497 F. 2d 1200 (9th Cir.). Discussing the

meaning of a "labor dispute" within a section of the National Labor Relations Act which authorizes employees to engage in concerted activities. The Ninth Circuit adopted a four part test: 1) there must be work-related complaint or grievance. 2) the concerted activity must further some group interest. 3) a specific remedy must be sought through such activity. 4) the activity should not be unlawful or otherwise improper.

The "work-related grievance" is the fact that Caruso complained that the Teamsters were breaking the law; the "concerted activity" was to economically punish Caruso who complained that a Teamster was breaking the law. Such conduct does not further any legitimate union interest; the specific remedy sought was to financially punish Caruso; and the means employed was through the circulation of malicious libels.

It is apparent from a review of the complete record that the foundation of the defamation in this case was nothing more than a public venting of a personal grievance.

Even if this was a "labor dispute" the language which the Teamsters now claim was merely loose and vituperative is not protected because the jury found that factually the language used constituted malice and in review of the complete record by the Appellate Court they came to the same finding.

In plain language of the United States Supreme Court in *Old Dominion Branch # 496, Letter Carriers v. Austin,* 418 U.S. 264 states: state libel remedies are preempted unless appellees can show that the publication was knowingly false or made with reckless disregard for the truth. At p. 14.

In *Hasbrouck v. Sheet Metal Workers,* the defendants circulated the plaintiff's name on a "do not patronize" list. The Ninth Circuit in *Hasbrouck* plainly states:

> Plaintiff also asserts as pendent to his § 303 action, claims of defamation and business disparagement under Oregon law. In so far as these claims are grounded on the publication of a "do not patronize" list, federal labor law preempts them. Falsity is a *sine quo non* for the maintenance of a state defamation or disparagement action in the labor field [citing *Old Dominion v. Austin*]. Circulating the name of the plaintiff's shop on a "do not patronize" list involved no express false statement.

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CONCLUSION

The Court should not grant certiorari to review the decision of the Supreme Court of the State of Washington.

Respectfully submitted,

/s/ Joseph J. Ganz

Attorney for Respondent

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT E. CARUSO,

Respondent.

v.

LOCAL UNION NO. 690 of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellant.

No. 51554-9

EN BANC

BRACTENBACH, J.—A labor union appeals from a judgment of $244,000 in favor of a defamation plaintiff, raising instructional, juror challenge, and evidentiary issues. First, did the trial court err in submitting conflicting jury instructions on the elements of a defamation action and the burdens to be met by a defamation plaintiff, and assuming error, is reversal required where the jury nevertheless found the plaintiff met his highest burden and substantial evidence exists to support that finding?

Second, did the trial court commit reversible error in denying defendant's challenge for cause of a juror, where defendant exercised a peremptory challenge as to that juror, and defendant demonstrated no prejudice through his use of a peremptory challenge?

Third, was reversible error committed when the trial court admitted the following evidence: (1) deposition of the individual whose altercation with the plaintiff was the basis for the alleged defamation; (2) testimony by plaintiff's expert on the issue of causation of plaintiff's business losses; (3) testimony regarding anonymous phone calls received by plaintiff and his employees shortly after publication of the allegedly defamatory article?

We hold that none of the alleged error amounts to reversible error. Accordingly, we affirm the judgment.

In 1969, Robert Caruso opened a retail floor covering business in downtown Spokane known as "Linoleum & Carpet City." Caruso also owned a parking lot located three blocks from his retail business. He rented parking spaces on this lot to customers on a monthly basis. Posted at the lot was a sign reading "Private parking. Violators will be towed."

On several occasions beginning in the summer of 1973, Caruso found access to the parking spaces on his lot blocked by delivery vans and trucks which were not authorized to be on his premises. On one such occasion he encountered a beer truck in which the keys had been left. Unable to locate the driver in nearby taverns, Caruso removed the keys from the truck and took them to his store. From there he called the owner, whose name was printed on the truck, and asked him to collect the keys and remove the vehicle.

In the meantime, the beer truck driver, Aleck Contos, who was a member of Local 690 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 690), had learned that Caruso

had the keys. Contos telephoned Caruso. After a heated exchange, Caruso informed Contos that he was going to have the truck towed. Caruso called the towing company.

Contos soon appeared at the parking lot, where Caruso was awaiting the tow truck. Contos protested the towing, became physically and verbally abusive, and threatened Caruso with retaliatory action by Local 690. In the midst of the general confusion which followed, Caruso received police intervention. Ultimately the beer truck was towed just far enough to remove it from the lot.

Shortly after these events, Contos related the incident to Mike Olds, an officer of Local 690. A few weeks later, the Washington Teamster, a union newsletter with statewide circulation at that time of approximately 50,000, carried a "do not patronize" article which is the focus of this controversy. Mike Olds wrote the article. It appeared in the November 9, 1973 newsletter as follows:

> Don't [P]atronize Carpet City in Spokane.
>
> This is to notify all members of Teamsters Union, Local 690 and all other Teamster and laboring people in the State of Washington that when traveling to and from the Expo City—"please do not *patronize Carpet City Carpet & Linoleum Shop* at West 518 Main Avenue"—Spokane, Washington," [sic] (Expo City). The reasons for this request are: This company is continuously harassing the Teamsters and other laboring people who may at some time use the parking facility at this place of business to make a delivery because of the congested traffic problems in Expo City since construction is going on mainly in that area. Someone from this company removes the keys of such vehicles, have [sic] the equipment impounded and create [sic] many problems for these employees and their employers including the cost of impoundment to those effected [sic].

> This company will not cooperate with these drivers when told that they will move their equipment and apologize for parking in this area—their equipment is still impounded.
>
> We request that all laboring people—Teamsters or otherwise—*do not patronize Carpet City Carpet & Linoleum Shop.*
>
> Thanks kindly for your *Support.*
> Teamsters Union, Local 690.

Upon learning of this article's publication, Caruso attempted to contact Local 690. His calls were not returned and his efforts to meet with the union's business agent were unsuccessful. He then began to receive anonymous threatening phone calls. These calls continued over a period of 6 months to a year and apparently parroted the language of the article in the union newsletter.

Caruso became despondent. He feared for his own safety and that of his employees. His two key employees began to carry handguns. His business dropped off. Finally, the next year, he moved his retail outlet to a shopping center north of town. He continues to operate at that location.

In December 1974, Caruso filed an action for business interference against Local 690. In April 1980, he amended his complaint to include defamation. Trial to a jury in March 1981 on both causes of action resulted in an award to Caruso of $102,000. The Court of Appeals affirmed in *Caruso v. Local 690, Int'l Bhd. of Teamsters,* 33 Wn. App. 201, 653 P.2d 638 (1982). This court reversed in *Caruso v. Local 690, Int'l Bhd. of Teamsters,* 100 Wn.2d 343, 670 P.2d 240 (1983), holding that plaintiff could not prevail on his business interference claim after *NAACP v. Clai-*

borne Hardware Co., 458 U.S. 886, 73 L.Ed.2d 1215, 102 S. Ct. 3409 (1982) (boycott of white merchants by a coalition of blacks for purposes of bringing about political, social and economic change was a constitutionally protected activity). Because the award to Caruso had been based on unsegregated business interference and defamation claims, this court remanded for retrial of Caruso's defamation action.

The retrial, which was held in December 1984, resulted in a jury award of $295,000 to Caruso based on defamation. Since Caruso had previously settled with another defendant, the court entered judgment against Local 690 for $244,000. We accepted direct review.

I.

JURY INSTRUCTIONS

The jury found that local 690 was liable for defamation, that the union's actions constituted malice, and that Caruso was damaged as a proximate result of the acts of the union. Local 690 contends that plaintiff failed to carry his burden on all elements of defamation and that certain jury instructions were erroneous. Since most of the jury instruction error assigned by the union relates to specific defamation elements, the alleged error will be analyzed under each element.

"[A] defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages." *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635, P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 352, 670 P.2d 240 (1983).

A. *Falsity*

Appellant assigns error regarding the falsity element to an instruction which appears to assign the burden of proving falsity to plaintiff while simultaneously giving defendant the burden of proving substantial truth. In *Mark v. Seattle Times, supra* at 486 this court required a defamation plaintiff to prove falsity. Such a requirement was recently approved by the United States Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps,* — U.S. —, 89 L.Ed.2d 783, 106 S.Ct. 1558 (1986). In that case, the Court held that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." *Philadelphia Newspapers, Inc.,* 106 S. Ct. at 1559.

Since it is settled that Caruso, as a private defamation plaintiff, has the burden of proving falsity, the challenged instruction is misleading to the extent it appears to assign simultaneous burdens to plaintiffs and defendant on this element.

The standard for sufficiency of jury instructions is set forth in *Brown v. Spokane Cy. Fire Protect. Dist. 1,* 100 Wn.2d 188, 194, 668 P.2d 572 (1983). Jury instructions are not erroneous if they "(1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." *Brown,* at 194. Since this instruction was misleading, under *Brown,* it was erroneous.

For erroneous instructions to require reversal, prejudice must be shown. *Brown,* at 196. Error is not prejudicial "unless it affects, or presumptively affects, the

outcome of the trial." *Brown*, at 196. Here, even if the instruction had not been misleading, the outcome would have been different only if Caruso had offered insufficient evidence to carry his burden of proving falsity. There must be "substantial evidence upon which the jury could not have rested its verdict." *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 658, 717 P.2d 1371 (1986). Substantial evidence was defined by this court in *Lillig* as that which is sufficient "to persuade a fair-minded person of the truth of the declared premise." *Lillig v. Becton-Dickinson, supra* at 658 (quoting *Ridgeview Properties v. Starbuch*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)).

In this case, the evidence was sufficient "to persuade a fair-minded person" that the article's statements were false. Caruso's evidence included testimony of his employees, both of whom tstified that Caruso had never before removed keys from any vehicle or had any vehicle towed. Moreover, they testified that Caruso had an exemplary relationship with all the teamsters who delivered to his store. In addition, a local tavern owner, who allegedly told the beer truck driver that Caruso habitually took keys and impounded vehicles, testified that he never made such a statement and had no knowledge of such behavior. Finally, the beer truck driver's deposition contained inconsistencies which bolstered Caruso's assertions of falsity. Since the evidence is sufficient, the outcome would not be different as to the falsity element, so there is no prejudice to defendant. Without prejudice, there is no reversible error.

B. *Unprivileged Communication*

In two unchallenged instructions, the jury was directed (1) that defendant had a qualified privilege to pub-

lish the statements, and (2) that defendant could only lose the privilege if it acted with malice. This is a correct statement of the law. *See Bender v. Seattle,* 99 Wn.2d 582, 601, 664 P.2d 492 (1983) (a defamation plaintiff must establish abuse of any qualified privilege by proving defendant acted with knowledge or reckless disregard as to the falsity of a statement). *Accord, Turngren v. King Cy.,* 104 Wn.2d 293, 705 P.2d 258 (1985); *Lillig v. Becton-Dickinson, supra.* In any event, since these instructions are unchallenged, both the existence of a qualified privilege and the malice standard required to establish abuse are the law of the case.

Local 690 assigns error to an instruction which again appears to assign simultaneous burdens of proving the existence, nonexistence, and abuse of a qualified privilege. This is confusing to the extent it suggests that the burden of proving nonabuse of the privilege rests with defendant. Under *Brown v. Spokane Cy. Fire Protec. Dist. 1, supra,* the confusion makes the instruction erroneous. However, the error is not reversible error under a *Brown* analysis unless the outcome of the trial would be different without the error.

Here, the outcome would not have been different, because the jury in fact found that Local 690 acted with malice. Moreover, there is substantial evidence in the record to support such a finding. Such evidence was offered through the testimony of Mike Olds, the Union official who wrote the article in question. Olds testified that he never tried to corroborate the story about Caruso, that he never made any attempts to contact Caruso, and that he had no knowledge of prior complaints of any kind against Caruso. Furthermore, he did not know Caruso's

parking lot was located three blocks from his retail store or that there was a second floor covering business in Spokane owned by one of Caruso's relatives (Olds wrote a subsequent article to clarify which one of the Caruso retail stores was not to be patronized by Teamsters). This testimony appears sufficient "'to persuade a fair-minded person'" (the *Lillig* standard) that Olds acted at least in reckless disregard of the truth of the story about Caruso.

C. *Fault*

Local 690 assigns error to various instructions which state that plaintiff must prove fault and that negligence is the proper standard. These instructions represent a technically correct statement of the law: "[i]f the plaintiff is a private individual, a negligence standard of fault applies." *Caruso v. Local 690, Int'l Bhd. of Teamsters, supra* at 352. Since Caruso is unquestionably a private plaintiff, he was properly required to prove negligence.

Defendant is correct that damages to plaintiff's business flowing from the "do not patronize" request are not standard as to the fault element. This argument is unpersuasive for two reasons. First, the basis for malice, according to defendant, is that the defamation arose from a labor dispute, and thus is accorded "labor libel" treatment. However, a labor dispute is generally limited to controversies concerning "terms tenure, or conditions of employment, or concerning the association or representation of persons in negotiating . . . conditions of employment." 51A C.J.S. *Labor Relations* § 294 (1967). Terms and conditions of employment were not at the root of this defamation.

Second, the jury found malice for purposes of abuse of a qualified privilege in any event. Once plaintiff proves malice for purposes of the privilege element, it follows logically that he has proven malice for purposes of the fault element as well.

D. *Damages*

Local 690 assigns error to instructions which allowed the jury, if it found for plaintiff, to award damages for lost profits, emotional distress, and harm to reputation. Defendants argue this was error because the jury was not required to separate damages resulting from the "do not patronize" component of the article from damages caused by the defamation.

Defendant is correct that damages to plaintiff's business flowing from the "do not patronize" request are not compensable. *See Caruso v. Local 690, Int'l Bhd. of Teamsters, supra.* The jury could properly award damages in this action only for defendant's conduct regarding defamation.

The instructions given the jury referred in many instances, to the "conduct" of the defendant. "Conduct", as referred to by the instructions, could be interpreted to include both the printing of the noncompensable "do not patronize" request and the compensable printing of the defamatory statements. We do not find, however, that the use of these instructions constitutes reversible error.

Jury instructions are to be considered in their en tirety. *Brown v. Spokane Cy. Fire Protec. Dist. 1, supra* Here, instruction 10 made it clear that this action was for defamation, and that "false statements of fact" must

be a proximate cause of said damages. In addition, instruction 25 informs the jury that publication of a "do not patronize" request is not actionable as long as it is lawful. Finally, instruction 2 makes it clear that "factual statements contained in the articles" are those alleged to be defamatory. Since a request would logically not be considered a "factual statement", the request not to patronize could not be interpreted as a defamatory statement. These instructions taken as a whole allowed the jury to award damages for dafamation only.

A final jury instruction challenged by defendant relates not to defamation elements but to whether the article contained statements of fact or opinion. Defendant argues that if an instruction had properly characterized much of the article as opinion, the statements would have been nonactionable.

Even assuming the statements were opinions, this court's recent decision in *Dunlap v. Wayne,* 105 Wn.2d 529, 716 P.2d 842 (1986) deposes of defendant's argument that opinion is not actionable. *Dunlap* set forth three considerations for determining when opinion is actionable: (1) nature of the medium, (2) nature of the audience, (3) implication of undisclosed facts.

First, in this case the medium was the union newsletter. Its purpose presumably was to impart objective, helpful information. It was not akin to an editorial page. Second, the newsletter's audience had no reason to expect exaggeration. Readers were likely to believe the information printed therein, and they were likely to expect the publishers to act in the best interests of the readership. Finally, the article contained implication of undisclosed

facts. The statements implied repeated acts and patterns of obstreperous behavior by plaintiff and suggested a pattern of antagonistic behavior toward teamsters.

Under *Dunlap,* even if these statements were opinion they were nonetheless actionable. Local 690's challenge to the instruction regarding actionable opinion is thus without merit.

II

JURROR CHALLENGE

During voir dire examination, one prospective juror stated that she thought unions in this country were "too strong." She also said she and her husband had had unpleasant experiences with unions. As a result of these statements, defendants challenged her for cause. When questioned by the court as to her prejudices, the juror answered she felt she could be a fair and impartial juror, notwithstanding some of her anti-union feelings. Based on this dialogue, the judge determined there was insufficient justification to excuse her for cause. Local 690 then exercised a peremptory challenge to prevent her from being seated.

State v. Latham, 100 Wn.2d 59, 667 P.2d 56 (1983) controls this issue. *Latham* states that a challenge for cause may be made for either implied or actual bias. However, even where a juror should have been removed for cause, the use of a peremptory challenge cures the error. The challenging party must then show that use of the peremptory challenge actually prejudiced his case.

Whether the juror in this case should have been removed for actual bias is arguable. Defendant, however,

exercised a peremptory challenge, thereby curing any error. Moreover, defendant has demonstrated no prejudice through forced use of a peremptory challenge. Under *Latham,* then, there is no error.

III

EVIDENTIARY ERRORS

Defendant alleges three separate evidentiary errors. The admission or refusal of evidence is within the trial court's discretion and the court will only be reversed for abuse of discretion. *Maehren v. Seattle,* 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), *cert. denied,* 452 U.S. 938 (1981).

A. *Conto's Deposition*

Aleck Contos, the beer truck driver whose altercation with Caruso gave rise to the defamation, was apparently unavailable to testify at trial. His entire deposition was allowed to be read into the record, with one minor exception not relevant here.

Contos told his version of the parking lot dispute in his deposition. This testimony would have allowed a jury to conclude that he was a man with a volatile temper who thought Caruso should have allowed him free access to the parking lot. The jury could also have inferred that Contos did not truthfully relate his encounter with Caruso to Mike Olds, author of the newsletter article.

Local 690 objected to the admission of those portions of the deposition which revealed Contos' actions toward Caruso. The union argued that such testimony was irrelevant to the establishment of malice on its part and even

if relevant, it was unfairly prejudicial. The trial court ruled the entire deposition was relevant.

ER 401 defines relevant evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Here, Contos' testimony was relevant to the question of falsity, because what Contos experienced with Caruso and what he later told the union gave rise to the defamation. Since falsity is an element to be proved in this case, its existence is certainly a "fact of consequence." Thus, this evidence is relevant.

ER 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Here, the danger was that the jury would see the Contos, rather than Local 690, as the defendant. However, the union distanced itself from Contos through trial testimony. Moreover, Contos did not testify in person. Finally, extensive arguments on this issue were made by both parties and carefully considered by the trial judge. Under these facts, the probative value of Contos' deposition outweighed any unfair prejudice to Local 690.

B. *Expert Testimony*

Plaintiff presented an expert on the issue of business loss who had impressive educational and experience qualifications. The expert testified extensively and explained what losses Caruso had sustained and how he, the expert, had ascertained those losses. Finally, plaintiff's counsel asked the expert how he might determine a possible cause for such a business loss:

Q As I understand your testimony, in answer to . . . [the] question [of defendant's counsel] you did go through this process of elimination; is that right?

A That's correct. I tried to look at retail sales, so forth.

Q Did you eliminate all of the potential causes for the drops that you have indicated?

A To the best of my ability, I eliminated all but one.

Q Which one?

A The one—the action on the Teamster's part that created some managerial problems for [Caruso] . . . .

Verbatim Report of Proceedings, at 845-46. Counsel for Local 690 did not object during this dialogue. Following the expert's final answer, counsel approached the bench and defendant requested a mistrial due to unfair surprise.

The trial judge refused both a mistrial and striking of the testimony. He found that the direction in which the questioning was going was clear, and that there was sufficient time for an objection to be raised prior to the time the answer was given. In addition, the record reveals that defendant later asked its business expert the same question. Moreover, instruction 6 cautioned the jury that it was to weigh the testimony and judge the credibility of all witnesses, including experts. In light of these facts, there was no abuse of trial court discretion in allowing plaintiff's expert's testimony on causation.

C. *Anonymous Phone Calls*

Caruso and his two key employees testified to receiving anonymous threatening phone calls at Caruso's store.

Testimony revealed that the calls began within 1 week of publication of the article and continued with some frequency for 4 to 5 months and intermittently for 4 or 5 more months. All three of these witnesses testified that the calls were abusive and intimidating and placed them in fear for their personal safety.

Defendant argued against admission of testimony regarding these calls, contending this evidence was irrelevant because the callers could not be linked to Local 690. Plaintiff contended that evidence of the calls was relevant to damages. The calls contributed to the anguish of plaintiff, to his preoccupation with his own safety and that of his family and employees, and to the drop in his business

The trial court admitted the evidence, reasoning that a link, if any, between Local 690 and the callers was for the jury to find. To guard against unfair prejudice, the court allowed an instruction which limited the use to be made of evidence of the calls.

ER 402, requires that evidence be relevant to be admissible. There is no question that evidence of the calls was relevant. These calls contributed greatly to the depression and anxiety of the plaintiff. Such depression and anxiety, in turn, contributed to his business loss. Business losses made up a portion of the damages to be established by plaintiff.

ER 403, discussed above, would exclude otherwise relevant evidence which is unfairly prejudicial. Here Local 690's concern was that the jury would infer that the union initiated or sanctioned the anonymous calls. But there was no trial testimony which would imply such sanc-

tioning or even knowledge. Moreover, counsel for plaintiff never tried to establish such a link. Finally, an instruction informed the jury that evidence of the calls was for a limited purpose. Under these circumstances, it was not an abuse of discretion for the trial judge to admit this evidence.

Under the foregoing analysis, we find no reversible error. The judgment is affirmed. [Dolliver, C.J., Utter, J., Dore, J., Pearson, J., and Goodloe, J., concur.]

• • •

ANDERSON, J. (dissenting)—I agree with the majority that the trial court's instruction 10, the burden of proof instruction given to the jury in this case, is misleading and erroneous because it assigns simultaneous burdens of proving falsity to plaintiffs and defendants. I also agree with the majority that the same instruction is misleading and erroneous because it assigns simultaneous burdens of proving the existence, nonexistence and abuse of a qualified privilege. I disagree with the majority's conclusion, however, that these two errors are harmless. I would conclude that the burden of proof instruction's totally erroneous statements regarding qualified privilege, coupled with its falsity error, constitute prejudicial error and would remand the case for a new trial before a properly instructed jury.

As I perceive them, the rules regarding the burden of proving a privileged communication in a defamation case are as follows. The defendant has the burden of establishing a privileged publication by proving a recognized public or private interest that would justify the utterance of the words.[1] Whether or not a privilege exists

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[1] W. Prosser, *Torts* § 115, at 796 (4th ed. 1971)

at all is an issue of law for the court to decide.[2] If the facts are in dispute, then the jury will be called upon to consider the evidence and pass upon the issues thus raised.[3] It is for the court, however, to decide whether the facts found by the jury made the publication privileged or to instruct the jury as to what facts they must find to hold the publication privileged.[4] Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication, by use of the occasion for an improper purpose or by lack of belief or grounds for belief in the truth of what is said.[5]

In this case, the court did observe these rules in part when it instructed the jury as follows:

> You are instructed that the Defendant has a qualified privilege to publish and distribute the articles to Teamster Union members.
>
> In order to overcome that privilege, Plaintiff must show by clear and convincing evidence that the Defendant abused its privilege, and that the Defendant knew the statements were disregarded or whether the statements were true or not.
>
> Reckless conduct is defined in Instruction No. 16.[6]

The trial court's instruction 10, however, is inconsistent and contradictory with the foregoing statement of the law. It reads:

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2 W. Prosser, at 796; Restatement (Second) of Torts § 619, comment a, at 316 (1977).

3 W. Prosser, at 796; Restatement (Second) of Torts, at 316.

4 Restatement (Second) of Torts, at 316.

5 W. Prosser, at 796.

6 Instruction 18.

The plaintiff has the burden of proving each element of the cause of action for defamation, which are as follows:

1. That the defendant made false statements of fact concerning the plaintiff.

2. That the defendant made this statement to a third party without privilege to do so.

3. That the defendant was at fault, amounting to at least negligence.

Plaintiff has the burden of proving that the defendant made one or more statements alleged by the plaintiff, that the plaintiff suffered damages as alleged and that the statements were a proximate cause of said damages.

If the plaintiff fails to prove any one of the foregoing elements, then your verdict must be for the defendant on plaintiff's claim for defamation. If, however, plaintiff proves his case, the defendant has the burden of proving the following defenses:

1. That the statements of fact were substantially true; the truth is a complete defense to an action for defamation.

2. That the defendant had a qualified privilege to make these statements.[7]

It is impossible to know what effect inconsistent or contradictory instructions may have upon a jury.[8] Instruction 10 raised the issue of whether a privilege existed and assigned simultaneous burdens of proof on the issue, while instruction 18 treated the existence of a privilege as set-

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[7] Instruction 10.

[8] *Hall v. Corporation of Catholic Archbishop*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); *Matteson v. Thiel*, 162 Wash. 193, 197, 298 P. 333 (1931).

tled and assigned plaintiff the burden of proving its abuse. Instruction 10 is not a correct statement of the law and could well have served to nullify Instruction 18 in the jurors' minds. I would hold that instruction 10, the erroneous burden of proof instruction, imparted prejudicial error into the case requiring a new trial.

Accordingly I dissent.

[Durham, J., and Callow, J. concur]

APPENDIX B

INSTRUCTION 10

The plaintiff has the burden of proving each element of the cause of action for defamation, which are as follows:

1. That the defendant made false statements of fact concerning the plaintiff.

2. That the defendant made this statement to a third party without privilege to do so.

3. That the defendant was at fault, amounting to at least negligence.

Plaintiff has the burden of proving that the defendant made one or more statements alleged by the plaintiff, that the plaintiff suffered damages as alleged and that the statements were a proximate cause of said damages.

If the plaintiff fails to prove any one of the foregoing elements then your verdict must be for the defendants on plaintiff's claim for defamation. If, however, plaintiff proves his case, the defendant has the burden of proving the following defenses:

1. That the statements of fact were substantially true; truth is a complete defense to an action for defamation.

2. That the defendant had a qualified privilege to make these statements.

INSTRUCTION 11

Although the defendant may have the burden of proving that the articles of which plaintiff complained are substantially true, the law does not require that they prove the articles were meticulously or exactly true in all re-

spects. The differences may be differences of no consequence.

INSTRUCTION 18

You are instructed that the Defendant has a qualified privilege to publish and distribute the articles to Teamster Union members.

In order to overcome that privilege, Plaintiff must show by clear and convincing evidence that the Defendant abused its privilege, and that the Defendant knew the statements were false, or acted in reckless disregard of whether the statements were true or not.

Reckless conduct is defined in Instruction No. 16.

INSTRUCTION 20

Plaintiff must prove that Defendant was negligent in publishing the articles. You may find Defendant negligent only if you find that the Plaintiff proved with convincing clarity that Defendant knew or, in the exercise of reasonable care, should have known that the factual statements were false in some substantial way, or would create a false impression in some material respect.

APPENDIX C

SPOKANE PENAL CODE SECTION 58

It shall be a misdemeanor for any person to go upon, occupy or remain upon the land of another after having been warned by the owner not to trespass; every owner who posted the property in a conspicuous manner prohibiting the trespassing is deemed by law to have given sufficient warning against trespassing within the meaning of this section.

APPENDIX D

NOTE

Spokane Traffic Code 4661600 expressly forbids the leaving of keys in an unattended vehicle. The Traffic Code further authorizes the impoundment of any vehicle which trespasses upon a posted lot.